

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEWYN FLOYD RODGERS,

Defendant-Appellant.

UNPUBLISHED

February 15, 2005

No. 250908

Wayne Circuit Court

LC No. 03-006261-01

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced him as a third habitual offender, MCL 769.11, to serve consecutive terms of imprisonment of two years for felony-firearm and seven months to ten years for felon in possession. Defendant appeals as of right. We affirm.

The arresting police officer spotted defendant and another person walking out of an alley in the early morning hours of April 23, 2003. When the officer followed them on foot, they fled to a residential back yard in a state of apparent agitation. The officer testified that he observed defendant place a handgun inside a door on those premises. The officer arrested defendant and seized the gun, which was a loaded semi-automatic.

Defendant argues that he is entitled to a new trial because the gun was secured in violation of his constitutional rights, and because defense counsel was ineffective for waiving production of the firearm in question and declining to present any evidence. We disagree.

Evidence obtained in the course of a violation of a suspect's rights under the Fourth Amendment of the United States Constitution is subject to suppression at trial. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997). This Court reviews the trial court's factual findings at a suppression hearing for clear error, but reviews the legal conclusions de novo. See *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). However, a defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that the police improperly seized the firearm in question without a warrant because defendant "exhibited familiarity with the property" where it was found, and

because there was no evidence that the location searched was part of an abandoned structure. However, there was no suggestion at trial that defendant had some residential rights to the premises upon which the gun was found, and defense counsel in fact pointed out that defendant lived about a block away. The remedy of suppression for warrantless searches is available only to those whose reasonable expectation of privacy in the area searched was violated. *People v Lombardo*, 216 Mich App 500, 504-505; 549 NW2d 596 (1996). Defendant's implied argument that running about a back yard in a state of panic indicates possessory rights in the parcel is a strained one. Because defendant nowhere asserted that he had privacy rights in the location in question, defendant lacks standing to object to the seizure on that Fourth Amendment ground.

Moreover, defense counsel argued not that defendant placed the gun at a residence where he had some expectation of privacy, but that the conduct of the police in following defendant constituted detention for Fourth Amendment purposes. To preserve an evidentiary issue for appeal, the party opposing the evidence must specify the same ground for objection at trial as is asserted on appeal. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). Defendant's new argument implying that he had rights in the premises where the gun was found fails to bring to light plain error affecting his substantial rights. *Carines, supra*.

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. See *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

Defendant first asserts that defense counsel secured for defendant "no possible benefit whatsoever" in waiving objections to the prosecutor's failure to produce the weapon at issue. However, that a gun was found was never seriously in doubt, as defense counsel acknowledged by disputing that defendant was the one who stowed the gun, not that it existed. Moreover, display of an actual firearm could conceivably have aroused the factfinder's passions beyond what mere description did. At worst, defense counsel was merely promoting judicial economy in relieving the prosecutor of acting on her offer to retrieve the actual firearm; at best, defense counsel was thereby avoiding heightened passions. Either way, defendant fails to show that defense counsel caused him any prejudice in stipulating to the nonproduction of the gun.

Defendant next makes issue of his not having testified at trial. Defendant cites authority for the proposition that the decision whether to testify is personal to the defendant, that defense counsel may not coerce a defendant in the matter, and that counsel must at least advise the client of the right. See *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97 L Ed 2d 37 (1987). However, defendant does not assert, let alone prove with record citations, that defense counsel in this instance failed in any of these duties. This state requires no proceeding on the record to recognize a valid decision not to testify. *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985). Instead, if the defendant "acquiesces in his attorney's decision that he not testify, the right will be deemed waived." *Id.* at 685 (internal quotation marks and citation omitted). Defendant fails to show that there was anything amiss about his silence at trial.

Defendant also argues that defense counsel's "novel theory of unlawful search and seizure," which apparently is the argument raised at trial that the police effectively seized

defendant by following him, constituted a failure to challenge the prosecutor's evidence. However, we found the more conventional theory advanced on appeal was an easy one to reject, and presume the trial court would have concluded the same as well. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defense counsel's "novel" argument was at least as likely to engage the trial court as the strained one rejected above.

Finally, defendant argues briefly that defense counsel was ineffective for failing to present any evidence after stipulating to nonproduction of the gun. Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). Defendant thus must show that counsel's failure to prepare for trial resulted in counsel remaining ignorant of substantially beneficial evidence that accordingly did not get presented. See *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). But defendant gives no indication what specific testimony or other evidence available to, but eschewed by, defense counsel would have been helpful. Because defendant fails to overcome the presumption of sound trial strategy, we reject this argument.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen